Sponſa nondum Uxor:

OR THE

MARRIAGE

Between the Lady

Katharine Fitz-Gerald

AND

EDWARD VILLIERS *Eſq;*

Aſſerted by

ROBERT THOMPSON LL. D.

Being an Anſwer to a Treatiſe, intiuled,

ΔΙΓΑΜΙΑΣ 'ΑΔΙΚΙΑ, *&c.*

Publiſhed under the name of *Dudley Loftus* Dr. of Laws, and Judge of the Prerogative Court in *Ireland.*

LONDON:
Printed for *Benjamin Tooke*, at the *Ship* in St. *Pauls* Church-yard. M. DC. LXXVII.

UMI

UMI

TO THE RIGHT HONOURABLE, GEORGE, LORD VISCOUNT *GRANDISON, &c.*

MY LORD,

HAving had the honour to be imploy'd, when first the ensuing Case became a Controversie, and this publick Vindication of my private opinion, being not only the effect of necessity, *but* duty, *I presume to beg the protection of your Lordships favour. It cannot be unknown unto your Lordship by what* unusual *methods the adverse party have proceeded in the management of* their *designs; How, that after a Diffinitive judicially pronounced, upon a deliberate debate on both sides, printed Papers have been dispersed both to arraign the Judgment given, and if pos-*

 sible,

sible to anticipate a second judgment with prejudices and undue aspersions; some of the Judges Delegates have been solicited with discourses and forein consultations upon the fact (if not purposely mistaken) much misrepresented; The Lady and those concern'd for her, amused and terrified with the daily noise and talk of an unanswerable Doctors resolution from beyond the Seas, and the Resolution it self, at length usher'd into the world, and addressed unto a great name (tho by a nameless Author) as the irrefragable conclusion of a person whose place and abilities, together with the transcendent Eulogies of his Voucher, must of themselves give it the authority of Truth no less than apodictical. What this Voucher (the Epistolizer) is, it will not be material to enquire, tho there are some reflections insinuated in his Panegyrick so inconsistent with Charity *and (indeed)* Civility, *that they deserve animadversion, (I mean of another nature.) It is easie to observe, that he is resolv'd (in spight of all sense and persuasion) to believe, and not examine the invincible arguments of his Advocate, so that unless I could attain to any competent gift of infallibility (which*

I despair of) I must leave him to abound in the same perfection of knowledge and faith wherein I found him: But in answer to the Advocate, and for the satisfaction of some few, who unwarily may be imposed upon, I have endeavoured to attaque this invincible Armada from beyond Sea, and how unsuitable the Epithete is to the thing, the success (like that of 88.) I hope will discover. I am not ignorant, that to your Lordships more noble and exalted inclinations, such discourses must appear pedantique, especially when they come farc'd out with the Frippery of Latine and little Sentences of Law to make an Eclate or Blaze of Learning. But being obliged to follow, not lead the Adversary, and that through ways and tracts of Study now much unfrequented, and after a discipline, and with Artillery very often out of fashion, I beg your Lordships pardon if I seem ridiculous for Company, or the discourse prove sometimes tedious through the use of Antique words or peculiar terms of Art: I have laboured what I could to avoid both, and by referring the Quotations to the Margin, have left the Connexion and Series of it entire, so as neither

neither to Interrupt the reading or understanding: If your Lordship shall vouchsafe to Patronize me so far forth as I am intelligible to all, I submit the rest to the Censure of my own profession, with protestation nevertheless of a perfect obedience to your Lordships commands, being with all respect and most due observance,

My Lord,

Your Lordships devoted and obedient Servant,

Robert Thompson.

JOHN

JOHN Lord *DECIES*, of the age of eight years, was married by the Arch-Biſhop of *Canterbury*, to *Katharine Fitz-Gerald*, with the conſent of her then Guardian, having compleated 12 years and a half of her age: She about 21 moneths after the ſaid Marriage diſagreed to the ſame, and on *Eaſter* Eve laſt took to her pretended Husband *Edward Villiers* Eſquire, the ſaid Lord *Decies* being yet alive, notwithſtanding the Inhibitions of the Court of *Arches*.

QUÆRE.

Whether ſhe could avoid the firſt Marriage with the ſaid Lord Decies, *or make reclamation thereof?*

THis is the caſe in the very words, as it is ſtated on behalf of the Lord *Decies*, and this the Queſtion thereupon propos'd, unto which (without any preſent exception to the fact, wherein it is redundant, or the addition of any circumſtance omitted) I take leave to give this direct anſwer, *viz.*

That the Contract or rather Promiſe of Marriage, between the Lord *Decies* and the Lady *Fitz-Gerald* was in it ſelf, and by interpretation of Law, but *de futuro*; and therefore the ſame was diſſoluble, and is legally diſſolved by the Lady her actual Marriage with *Edward Villiers* Eſquire. And in giving anſwer unto this firſt part of the Quære I have involv'd the ſecond; for if the Promiſe to the Lord *Decies* be avoided, the Ladies Reclamation is unneceſſary.

The learned Advocate (on the contrary part) in his Examination of the queſtion, hath divided the ſame into one more general, ſtated with ſeveral diſtinctions, limitations, and ſpecifications (as he ſays) all which ſhall be conſidered hereafter. But I choſe rather, to evince firſt, the truth of my own aſſertion, ſo that having therein premis'd the nature and true ſtate of the controverſie, it may appear from thence, (if there be occaſion to diſpute,) that we either do, or do not rightly underſtand one another.

To proceed therefore, I lay down this for a Rule, and deriv'd from ſuch principles, as I preſume, cannot be denied me, *viz.*

That a (*a*) Promiſe of Marriage is not a Contract of Marriage, nor doth the ſame afterwards paſs into a Marriage, without a new conſent of the perſons to be oblig'd: (*b*) And therefore if the Promiſe between the Lord *Decies* and the Lady *Fitz-Gerald* were barely ſuch and no more, and there appears in fact no ſubſequent conſent, or capacity of conſent to marriage,

(a) *Vid. cap. unic. de Diſp. Imp. in ſexto Fachin. Cont. l. 3. c. 34. Bald. Conſil. l. 3. c. 194. Surd. Conſ. 364.*

(b) *Vid. Proſp. Fagnan. in c. Is qui Fidem. de ſponſal. Papa non poteſt efficere ut ſine conſenſu expreſſo vel tacito ſit matrimonium; & hoc verius & communius V. Hoſtienſ. ib. Vid. plenè Bald. 3. vol. Conſ. 194. Surd. Conſ. 364.*

then

then is that Promiſe voidable, and avoided *ipſo jure*, by her actual marriage with *Edward Villiers* Eſquire; but that the ſame was a promiſe only, and not *ipſum matrimonium*, it may from hence appear.

Firſt, All perſons above the age of ſeven years may promiſe, or conſent to marriage *de futuro*, but cannot legally contract marriage; for the Law hath preſcrib'd a certain and determinate Age for ſuch Contracts, *viz.* 14 in the male, and 12 in the female, and a Conſent interpos'd before that time is a void Conſent, and not ſufficient to perfect marriage, as being contrary to the expreſs proviſion of the Law; ſo that if the Conſent be defective, the Contract, and conſequently the Obligation muſt be defective alſo; for *ubi non eſt cauſa non eſt cauſatum.*

cap. Thæ Fraternit. de ſponſ. Lancelot. Inſt. l. 2. tit. 10. §. 10. cap. Acceſſit de deſp. Imp. C. unic. de deſp. Imp. in Sexto.

Secondly, I ſay (*a*) reſpectively compleat, for without a conſent perfect on both ſides, there can be no contract of marriage. It is true, the Church of *Rome* hath thought fit to make Marriage a Sacrament, but it hath not thereby changed the nature of it, it is ſtill a contract and, *quatenus* ſuch, receives its perfection wholly from conſent. Now this † conſent muſt be valid on both ſides, or neither; for if we grant (as it is undeniable) that Marriage is a Contract which receives its perfection from conſent, and all ſuch Contracts are *ultro citroque obligatorii*; * Then to affirm, that from the capacity of conſent on one ſide, without the like capacity on the other, any Contract of marriage can be conſtituted, or reciprocally oblige both parties, when the cauſes both of contract and obligation

(a) *C. 2. & 3. Extr. de deſp. Imp. l. 1. §. 1. ff. de pact.*

† *Gl. & DD. in C. de illis il. ſecundo de deſp. Imp. præſertim Hoſtienſ. ubi ſupra. Vid. Vinn. & DD. in Inſt. de Empt. & Venditon. ſuper Rubric. Ant. Guib. Coſtan. Quæſt. c. 8. Cujac. in l. 19. ff. de V. S. Bald. Conſ. 194. l. 3.*

ligation are manifestly deficient, is a doctrine not only new, but altogether absurd *.

* *Vid. Fachin. controv. l. 3. c. 34. vid. Joh. Baptist. Vivian. in Rat. super d. c. de Illis ubi supra.*

Thirdly, An *Impubes* is as uncapable to contract marriage as an Infant is to promise *de futuro*; but an *Impubes* may promise *de futuro*, (*a*) and yet such a promise *inter Impuberem & Infantem* does not induce a contract *de futuro*, the reason is because the consent which should perfect such promise, is on one part defective, and from that reason, a Contract of marriage *inter puberem & impuberem* (altho *per verba de præsenti*) is no contract of marriage as being equally subject to the same imperfection. Espousals as well as Marriage receive their essence, and being, from consent, but an imperfect consent will not constitute Espousals, *à fortiori*; therefore the same will not constitute a marriage.

(a) *C. Accessit de desp. Impub. & cap. unic. eod. tit. in sexto.*

Fourthly, There is a difference even between *sponsalia de præsenti*, and *ipsum matrimonium*, for if the Law or agreement of Parties have either tacitly or expressly annex'd any condition to the substance of the marriage, or consent, altho the contract be *per verba de præsenti*, yet until the condition be purified, it is *revera*, and amounts to no more, than *sponsalia*, or a promise *de futuro*.

Vid. Mæstert. de sponsal. in fin. lib. mater. illustr. & Ant. Fab. Jurispr. Papin. de Nupt.

Thus in *L. si uxor ff. de rit. Nupt.* it was not allow'd to be a Marriage, but Espousal only, or promise *de futuro*, because the Woman was under the age of 12 years.

And so in *C. ultimo de desponsat. Impub.* the Man was of full age, but because it appear'd that the Woman was not compleatly 12, and there was no proof or suggestion

geſtion of her extraordinary diſcretion or *malitia* to ſupply the defect of age, altho there was a mutual conſent between them, and frequent ſubarration, the Text concludes *proculdubio inter eos non conjugium ſed ſponſalia contracta fuerunt*: But the Text in *C. Unic. de deſp. Impub. in ſexto*, is much more plain and poſitive, and becauſe there may be occaſion to make uſe of it hereafter, it will not be unneceſſary to ſet it down verbatim. *Si infantes ad invicem vel unus major ſeptennio, & alter minor, ſponſalia contraxerint, ipſi vel parentes pro eis: niſi per cohabitationem eorum mutuam, ſeu aliàs verbo vel facto ipſorum liquidò appareat eoſdem in eadem voluntate factos majores ſeptennio perdurare: ſponſalia hujuſmodi quæ ab initio nulla erant per lapſum dicti temporis minime convaleſcunt: & ideo cum ſint nulla ratione defectus conſenſus, publicæ honeſtatis juſtitiam non inducunt. Idem quoque ſi pubes & impubes vel duo impuberes non proximi pubertati, & in quibus ætatem malitia non ſupplebat, per verba contraxerint de præſenti: ſponſalia enim illa, quæ juris interpretatione tantum fuerunt ſponſalia de futuro (licet verba conſenſum exprimentia de præſenti haberent, & matrimonium contrahere intenderent contrahentes) per adventum pubertatis in matrimonium non tranſeunt de præſenti: nec matrimonium (quod ut matrimonium ætate non tenuit prohibente) per lapſum dicti temporis convaleſcit: niſi per carnis copulam ſubſecutam vel aliquem alium modum contrahentes eoſdem cum ejuſdem perſeverantiâ voluntatis ad pubertatis tempora perveniſſe conſtiterit evidenter: per dictum tamen contractum, qui valuit ut potuit, non ſicuti agebatur, publicæ honeſtatis juſtitia eſt inducta.* *C. unic de deſp. Impub.*

This Text, as I conceive, is clear, and the interpretation eaſie; but if the learned Advocate doubt, he

he may receive satisfaction from *Covarruvias* and the Counsels of *Baldus* and *Ruinus* unto which he refers: he may there find that learned Doctor wondring at the confidence of those few, who endeavour to contend for the contrary opinion, when the decision and reason of the Law are in express and conclusive terms against them. Indeed the Reasons evidently deducible from the nature of the action, are of themselves sufficient to convince any person not given over to obstinate prejudice and prepossession.

Covar. de Sponsa. part. 1. §. 1. c. 5. num. final. v. Surd. Consil. 364.

Fifthly, The Statutes and municipal Laws of this Realm nothing disagree from the Laws and Reasons above recited. In the Stat. of Felony to marry a second Husband, 1 *Jacob. c.* 11. there is this restriction; *Provided that it shall not extend to any person or persons for or by reason of any former Marriage made within age of consent.* Upon which words my Lord *Coke* hath this observation; If the Man be above fourteen, and the Wife under twelve; or if the Wife be above twelve, and the Man under fourteen, yet may the Husband and Wife so above the age of consent disagree to the Espousals as well as the party that is under the age of consent, for the advantage of disagreement must be reciprocal: And so it was resolved by the Judges and Civilians, *Trin.* 42. *of Eliz.* in the Kings Bench, in a Writ of Error between *Babington* and *Warner*. He that prefac'd to the discourse of the contrary party, undertook, that the Learned Advocate had confuted this great Sage his opinion, " not only by the incom-
" petency of his Authority, being neither Judg of, nor
" vers'd in Matrimonial causes, but also from inevi-

Inst. p. 3. c. 27.

table

"table deductions from his miſtaken Poſitions. I wiſh the Gentleman had quoted the place, tho this is the moſt pertinent to the caſe in queſtion, that my Reading hath directed me unto; and this muſt be it, till either the Epiſtolizer or Advocate will give us another; for I find neither name of place or Author afterwards. But whether or no it is, I think it appears that both the Law and the opinion of the Lord *Coke* are very conſonant to the Authority and Reaſon of the Laws before cited, ſo that if the Authority of the Lord *Coke* were miſtaken, yet his Reaſon being evident and perſpicuous, and it being no where to be found that the Lord *Coke* is ſo much as mentioned afterwards by the Advocate; "it follows by inevitable "Deduction, that this poſition of the Epiſtolizer is "mightily miſtaken.

Now if a Contract of Marriage (altho *per verba de præſenti*) *inter puberem & impuberem*, where nothing hath intervened to ſupply the defect of age, can be but *ſponſalia de futuro*, and it is neceſſary before ſuch *Sponſalia* or Promiſe can paſs into a real Marriage, that there be *perſeverantia, & novus conſenſus ex parte Impub.* it is equally as neceſſary that there ſhould be the ſame perſeverance and conſent alſo *ex parte puberis*, becauſe a Contract of Marriage cannot ariſe from the conſent of one party only. And therefore, foraſmuch as it appears that the Contract or Promiſe of Marriage between the Lord *Decies* and the Lady *Fitz-Gerald* is but *de futuro tantum*, and that there is no pretence of more than ordinary Abilities or Diſcretion in the young Lord to ſupply the defect of Age; or that he was ever in a capacity

capacity to accept the Ladies promiſe, or to give conſent either real or preſumtive *quoad Matrimonium.* It remains only to prove that this promiſe *de futuro* was voidable, and is legally avoided by her Marriage perfected and conſummated with *Edward Villiers* Eſq;

Vid. Sichard. Perez. & DD. in l. 1. c. de Sponſal. Rittershuſ. diſſ. Jur. Civ. & Can. l. 1. c. 1.

b Vide Menoc. de Arbitrar. ubi ſupra.

c V. Cap. attteſtationes 10. de deſp. Impub.

Before the Emperors became Chriſtian, Cauſes of Eſpouſals and Marriage were of Civil Cognizance, and by that Law ſuch Eſpouſals or Promiſes of Marriage were diſſolv'd at pleaſure, *re integra exiſtente.* And, that they are even by Canon Law (*b*) *ipſo jure* many ways diſſoluble there is very little queſtion: It appears that when they have been confirmed by an Oath, and there hath interven'd the (*c*) Initiation of a ſubſequent conſent *per niſum copulæ*, that theſe have not been cauſes ſufficient to implead a perfect Marriage *ex poſt facto.* The Reaſons I take to be as manifeſt as the Authorities. For if a new conſent be eſſentially neceſſary (*poſt ſponſalia*) to create a contract of Marriage, ſo that without ſuch conſent it is no Contract, then is there no Obligation (I mean *in foro externo*) for as no civil action can be conſtituted without an obligation, ſo no obligation can ſubſiſt without a contract. It is true *Connanus* is reprehended by Modern Writers (and perhaps juſtly) for his too General aſſertion, that no Obligation can be deduc'd from contracts that have not συνάλλαγμα; but this is (I ſay) for his too general aſſertion; For contracts that receive their perfection meerly from conſent (as Marriage doth) are a diſtinct ſpecies, and differ materially from other contracts; Without an intire and reciprocal conſent, ſuch cannot be called Contracts, much leſs can it be ſaid that there is a Reciprocal Obligation

Grot. de J. B. lib. 2. c. 11. § 11. Vid. Vinn. § 2. Inſt. de Obligat.

gation constituted, when the constitutive cause thereof was never yet existent, being therefore no contract of Marriage, the Obligation is hitherto dissoluble.

2. As the obligation of a promise *de futuro* is dissoluble, so is the same many ways and for divers causes dissolved.

† The Judg Ecclesiastical may for several causes *ex arbitrio*, dissolve Espousals, and such as have been Contracted *in impubertate*, notwithstanding the perseverance of both Parties until their lawful age of Consent.

† *l. qui Res.* §. *Aream. ff. D Solut. Zanches. de Matr. l.* 1. *disp.* 48. *n.* 3.

† *Cap. requisiuit & C. ex literis de Sponsal. Vid. Menoch. ubi infra.*

I shall not much insist upon what causes have been propounded, and, as I believe, prov'd on the behalf of the Lady; one I am sure there is, and that omitted in the printed Case, the cause of Fear, and deduc'd with such Circumstances, that if the Promise between the young Lord and Lady had been an absolute Marriage, there had been no necessity to have proceeded (as I conceive) *ex capite nullitatis matrimonii ratione minoris ætatis*, there being otherwise sufficient cause of nullity and dissolution.

3. A promise of Marriage *de futuro* is only *vinculum initiatum & solubile*, Marriage is *vinculum perfectum, & indissolubile*, what was before possible and the young Lady had hopes to perfect, is now past all hope; for that consent, which should have transubstantiated his Espousal into Marriage, is by the Act of the Lady irrevocably pass'd away, and not only the dominion of her Body, but her Will is absolutely transferr'd to a third person (*a*); So that he, having intirely perfected his Contract, must be preferr'd as to the right and property of what he hath thereby acquir'd, rather than the

(*a*) *V. Cap. Sicut ex literis c. si inter Virum. Cap. Adolescens de Sponsal.*

perſon who claims meerly from a Promiſe. If there were any right acquir'd by the Promiſe, it is extinct * by the Contract; A perfect Contract is not to be invalidated by an imperfect act or agreement of a Contract only intended.

*Vid. L. quoties 15. Cod. de Rei Vindic. Barboſ. in 2. par. Rub. ff. Solut. Mat. n. 78. & n. 86, 87. Covar. var. Reſol. l. 2. c. 19. Mynach de Arbitrar. l. 2. Cent. 5. Caſ. 455. n. 9.

To conclude this point,

All the Objection offer'd to the contrary, is, that the Lady having contracted Marriage with *Edward Villiers* Eſq; ſhe hath therein proceeded contrary to her Promiſe *& contra prohibitionem Juris*; which if I ſhould grant, yet there is no Law that avoids therefore a Marriage contracted with another perſon, (who legally may marry) by reaſon of a Promiſe antecedent to ſuch contract. Before the Council of *Trent* clandeſtine Marriages and ſuch as were ſolemniz'd *ſine conſenſu parentum*, were, and are ſtrictly prohibited where that Council obtains not, (as here in *England*) but not *eo ipſo* void or voidable, not that the Church doth thereby approve the action, but to prevent a greater inconvenience. *Quoad pœnam*, the violation of this prohibition was nevertheleſs cognoſcible *in foro interiori*, but *in foro externo* the Action held good, *quaſi Jure permittente*; and hereupon *Grotius* appoſitely delivers himſelf: *Si lex humana conjugia inter certas perſonas contrahi prohibeat, non ideo ſequitur irritum fore matrimonium ſi reipſa contrahatur, ſunt enim diverſa prohibere & irritum quid facere, &c. nam ſæpe incommoda quæ reciſionem ſequuntur majora ſunt quam ipſa indecentia, & incommodum actus ipſius.* With this agrees the *Rule, Multa impediunt Matrimonium contrahendum quæ non dirimunt contractum*, and in the C. *Sicut.* 22. *de Sponſal.* the caſe is plain and peremptory, tho the reaſons

ſons not altogether the ſame before related.

Having therefore cleared this objection, and prov'd as far forth as is here neceſſary, that the Contract between the Lord *Decies* and Lady *Katharine Fitz-Gerald* was in it ſelf, and by interpretation of Law but a Promiſe of marriage *de futuro*, that it continued ſuch at the time of the Lady her actual marriage with *Edward Villiers* Eſquire, And that promiſes *de futuro* are avoidable, and *ipſo Jure* avoided by contract of marriage *de præſenti*, it follows that the Lady hath avoided the Promiſe to the Lord *Decies*, and (no other impediment appearing) the marriage with *Edward Villiers* Eſquire contracted and conſummated is a lawful Marriage, and by Law indiſſoluble.

I ſhould now proceed to animadvert upon the Advocates Argument on the contrary part. But leſt I may be blam'd for omitting one weighty circumſtance deduc'd in the printed Caſe, *viz.* the Inhibitions of the Court of *Arches* : I muſt inform the Reader, that it is not yet agreed upon that ſuch Inhibitions were ever ſerv'd upon the Lady (as is ſuggeſted) but whether they were or no, I hereby undertake to give a due account of them and their operation in a more convenient place.

The Advocates preparatory Queſtion is this, *viz.*
"*Whether, and when, thoſe who contract marriage may depart*
"*therefrom by Reclamation?*

By the following diſcourſe I obſerve, that by the word Contract he underſtands barely *Sponſalia* or a Promiſe *de futuro*, though to ſpeak properly that appellation agrees not with the thing it would expreſs, Contracts

always relating to the time preſent, and it is impoſſible to induce a preſent obligation from promiſes which ever relate to the future: But whether he meant either *Sponſalia* or *Matrimonium*, how much the Act of Reclamation relates unto the preſent Controverſie, I leave to any indifferent Judgment. Suppoſe I ſhould grant, that two perſons (not Infants) but the male 14 complete, and female not 12, (or *è converſo*) ſhould promiſe marriage *per verba de præſenti*, and that the *Pubes* or perſon having completed lawful age at the time of the promiſe, ſhould be in no capacity to reclaim, but bound to expect until ſuch time as the *Impubes* ſhould arrive at a ſufficient age for perfection of marriage. It muſt be inquired how, *& quo jure* ſuch perſon is bound ſo to expect? The Canon Law, tho it induceth obligations from voluntary promiſes, yet there is a different Judicatory for the deciſion of ſuch as ariſe from Contracts, and ſuch as ariſe from Promiſes, hence proceeds the diſtinction, (* ſaid to be St. *Auguſtins*) *inter fidem pactionis & fidem conſenſus*; and the one ever relates *ad forum internum & pœnitentiale*, the other *ad externum & judiciale*. To bring this home to the preſent Controverſie: Altho the Lady *Fitz-Gerald* were of ſufficient age to contract marriage, yet the Lord *Decies* being not of ſufficient age, here could intervene but *fides pactionis*; for ſince conſent ought to be reciprocal *& ad idem*, without ſuch ſimultaneous conſent there could be no Contract; And the young Lord having no capacity to conſent to marriage, it is a groſs abſurdity to affirm that here is any obligation conſtituted *in foro externo*, † or that one ſide ſhould be ſtrictly bound to perſeve-

* *V. Can. ult. 27. q. 2. & cap. 1. extr. de ſponſ. duorum. vide Barboſ. in collectan. vid. Caniſ. in Rub. de ſponſ. duorum.*

† *Cujac. in c. 1. de ſponſ. duorum Gallicè vocat. Foy de convenance & conſentement.*

perſeverance †, and the other at liberty, unleſs a Contract of Marriage can be perfected from the conſent of one part only. To make this plainer, I put this Caſe, *Titius* contracts matrimony *in ſcriptis per verba de præſenti* with *Sempronia*, reſident *in partibus remotis*, that this Contract may take effect he makes Letters of Procuration, and diſpatches away his Mandatary to accept of the conſent of *Sempronia*, before ſuch acceptation here is no Contract; nay if the Mandatary do in his name accept, and *Titius* have before that time revok'd his Proxy, this is yet no (*a*) Contract.

† *Vid. Fachin. contr. l. 3. c. 34.*

Here one would think an abſolute promiſe deduced into writing on one ſide, with authority to execute, and make the ſame a Marriage, more firm than in the Caſe of the Lady *Fitz-Gerald*, where no authority could be given to perfect ſuch an agreement: But it ſeems one conſent could not make it a Contract, or Promiſe irrevocable. I cannot therefore comprehend the Reaſon why the Advocate ſhould here conclude that when one of Age Contracts with one under Age, the Contract is immediately good as to both, " and yet if he make reclama-
" tion the Contract of Marriage is diſſolv'd, but if he
" ſhall not reclaim, they ſhall be compell'd by the
" Church to proſecute the Contract; for if it were immediately from that time a Contract of Marriage, then were the Obligation indiſſoluble from that time, which it is not, for the Minor may unlooſe it by Reclamation: † If it be then a Promiſe *de futuro*, why is it not diſſoluble in the ſame manner as other Promiſes of the like nature? By the Imperial Law, * In all Contracts

(a) *Vid. Duaren. in ff. ſolut. mat. c. 2. & c. ult. de Proc. in 6.*

† *Hieron. Torniel. trac. Si quod ago non valet. n. 7. & 17.*

* *Vid. Anton. Fab. in Rational. L. Sed Celſus §. ult. de contrab. Empt. l. 3. & 7. C. de Reſc. Vend. Carpz. deciſ. Saxon. 192. p. 3.*

tracts that depend upon consent alone, *re integra existente* (that is, before the absolute perfection thereof) *semper locus datur pœnitentiæ*. Why the Rule should not hold in Contracts of Marriage, the Advocate hath not shewn us either Reason or Authority; or that the Minor, if he do not reclaim, shall be compell'd to prosecute the Contract; unless he make no difference between Coaction and Admonition †. But to give a pure natural account of this Case in answer to what the learned Advocate would have it, I take this to be the utmost extent of the Law, *viz.* That if both the Lord and the Lady had continued under this Promise reciprocally until the Lord had been of complete Age to marry or to make this a presumptive Marriage, that then he might have call'd the Lady to have had this Promise made a perfect Marriage *Judicio Ecclesiæ*, as in other Cases of Espousal, and (had there been no reason offer'd on her part to the contrary) she might have been admonish'd (possibly compell'd) (there being some circumstances in those cases arbitrary) to have perform'd and perfected this Promise, though the Reason hereof would have proceeded from her perseverance until the time of his full Age, and not her original Promise: For when one of the Parties before such time as the Contract of Marriage can legally be perfect, shall manifestly dissent either by Contract *de præsenti*, or Marriage elsewhere, the Promise *de Matrimonio contrahendo* is extinct, both admonition and compulsion cease, the lesser obligation ever submitting to the greater; And although by the Old Canon Law, the Lady might have

† *cap. Requisivit. 17. de sponsal. ubi Cujac. & in c. ex literis. 10. ibidem. Sponsalia de futuro nexum indissolubilem non inducunt, neque tum cogi poterunt partes ad promissum conjugium; moneri tamen debent de promissione ut fidem datam liberent & concio pœnitentiæ graviter acuenda est contra conscientias, V. Mantic. l. 3. Lucubr. Vatican. & Ziegler. in Lancelotti Institut. l. 2. p. 10. §. 5. cit. at. Chemnit. loc. de Conjug. pag. 214.*

have been anſwerable *ex fide promiſſionis in foro pœnitentiali* (or before her Ghoſtly Father) *quoad pœnam* (were there not circumſtances even to excuſe that alſo) yet *ex fide conſenſus*, the validity of the Marriage is unqueſtionable *in foro Judiciali, & quoad vinculum indiſſolubile* *.

But the learned Advocate applies himſelf more particularly to the Caſe; and hath found out a notable diſagreement between the Gloſs and the Text, *Cap. De illis 7. de deſponſatione Imp.* He will not be convinc'd but a Contract of Marriage may claudicate, and two Perſons may be made one Fleſh upon the bare conſent of one Party, though if in the peruſal of this Chapter he had conſidered that there was *conſenſus ſponſaliticus* as well as *matrimonialis*, or that a Promiſe *per verba de præſenti inter puberem & impuberem*, was both in it ſelf and by interpretation of a ſubſequent Law, but *ſponſalia de futuro*, and not *ipſum matrimonium*, he might have ſpar'd the labour of his own Comment, and his unreaſonable quarrel with the Common Gloſs.

His main ſtreſs lies upon this Paragraph, *Mulier autem quæ poſtquam, &c.* and from hence I expected, that this Inference, *viz.* that by reaſon of the conſent of the *major* given to the *minor*, *per verba de præſenti*, there was a Marriage already conſtituted: The abſurdity of which Suppoſal I have more than enough demonſtrated; for if it were a Marriage, then were it indiſſoluble, and there could be no place for diſſent; but if it be no Marriage, why ſhould the *pubes* be obliged to expect the conſent of the *impubes* when

* *Non dies me abſolvit ſide priorum ſponſalium, ſed fides poſterior quæ majoris momenti eſt, Fides major & uberior quam aliàs dedi per verba præſentis temporis. Cujac. in C. ſicut ex literis de ſponſal. & matr.*

Vid. Anton. Hyemi i. e. Hyor. collect. ſoreus, c. 43.

when there is no Contract of that kind existent.

The Gloss rightly interprets the Text from Reason and the nature of Contracts that depend upon consent, considers the whole Chapter with the intent and scope thereof, does not mistake the word *sponsalia* simply for marriage, but restrains the word *nupsit* meerly to promises *de futuro*, and then concludes, that although Promises and some Contracts may stand upon one Leg, yet a Contract of Marriage cannot so subsist, for being perfected by consent alone, such Contracts are of their own nature bilateral *ultro citroque obligatorii*, but it is impossible to create a Contract *ultro citroque obligatorius* from the consent of one part only. Why then the Gloss should lye under the imputation of corrupting the Text, I do not understand, and as little how from the Reason or Authority of that Law the Consent of the Lady was a consent *eo ipso ad matrimonium*, unless she had purified the condition implied in her Promise by her perseverance until the time of the Lords complete age or given some other presumptive consent thereunto: It is not every consent that makes a Marriage, but *consensus legitimus & legibus approbatus*. It appears even from this Text, that the young Lord was only capable to promise, not to contract Matrimony; but that the act done may be good to some effect according to the Rule, *Si non valeat ut ago, valeat ut valere potest*, the Law hath resolv'd such Contracts into Promises *de futuro*: So that if we compare the Text and the receiv'd Common Gloss together with the *C. Unic. in Sexto.* The meaning is most plain

Vid. Franc. Cardin. Mantic. Lucubrat. Vatican. l. 14. tit. 41. n. 9. 10. vid. Mæstertium de sponsal. in fin. tractat. Illust. & Zeigler. in Lancelot. inst. l. 2. t. 12. §. 3. Duar. in ff. solut. Mat. ubi supra.

plain and obvious. A Contract of Marriage *inter puberem & impuberem* is in it ſelf, and by expreſs Interpretation of Law a Promiſe only *de futuro*, but Promiſes *de futuro*, oblige *ratione promiſsionis tantum non contractus*, and therefore, as in all other Promiſes *de futuro*, the *pubes* having contracted marriage elſewhere before ſuch time as the *impubes* was of capacity to conſent *ad matrimonium*, the Promiſe is extinguiſh'd by the greater *vinculum*, and the Marriage valid and effectual. From this explanation of the *Cap. de Illis* 7. and the Gloſs thereupon, I conceive all the Objection of the learned Advocate may receive an anſwer; to proceed further I muſt neceſſarily engage my ſelf either in vain repetition or a ſecond Controverſie merely about Words, which will conduce little to the Cauſe and leſs to the ſatisfaction of the Perſons principally concern'd herein. I ſhall therefore only mention the word *conſtare*, and take leave to differ from the Advocate, with reference to what hath been before obſerv'd: The phraſe ſeems to expreſs the ſubſtance of the Action, and not the duration or continuance; and I have not yet found any Authority or reaſon to make me believe that it was ever us'd in ſuch ſenſe before the appearance of this new Author.

I forbear alſo to examine that *Jargon* about the Authority of the Common receiv'd Gloſs. 'Tis all exactly recited from *Kahel Wateran, Anglice, Calvin's Dictionary*, and *Maſcard de probationibus, Vol.* 7. *Concl.* 943. All I wonder at, is that the learn'd Advocate ſhould adventure to condemn the Gloſs, without either Au-

thority of other Laws or consent of Doctors: it is receiv'd into practice by the same Sanction with the Body, and as to this particular Case hath a known remark upon it, and is generally call'd *Aurea Glossa*. But being confirm'd by a full and absolute Decree of the *Rota*, it must be taken according to the receiv'd Rules of Law for an opinion too great to be impeach'd by one single Doctor or Interpreter: and for the Gloss of *Accursius* both Judges as well as Reading and Consulting Doctors, defer generally to his Authority, though it is to be noted that every Gloss under the name of *Accursius* is not his; he happen'd to have two Sons and both Gloss-makers, the second was call'd *Cernotinus*, who had the ill luck (as the Story goes) never to make good one. I hope the Advocate hath been more tender of *Accursius* his reputation and his own, than to lay the Iniquity of the Son upon the Father; for in some Countries his Gloss makes equal Authority with the Text, and if the Advocate will take the Opinion of *Cujacius*, *Accursius* the Father's Gloss is the best extant.

Præpos. in cap. de Illis, ubi supra.

Vid. Rigos. in L. hæc verba de V. S. ubi citat Cæpollam.

Vid. Duck. de usu & Aut. J. C. in prima parte.

But the next Observation is more considerable.

Let it be observ'd (says the Advocate) that the *Cap. de Illis*, being written by Pope *Alexander*, and directed to the Bishop of *Bath*, must needs be taken for Law. Now why this Gloss of the Advocates must needs be true, whereas (by the note immediately foregoing from *Baldus* his Authority) *Doctrina Glossæ nullam nobis necessitatem imponit*, I see no Reason: Most of the Decretal Epistles are written to the *English*, but therefore it doth not follow that they are all

Law

Law here in *England*, for it is the Receipt and constant usage of them that gives them current Authority here; * And this appears from the Statute that relates to Eccleſiaſtical Juriſdiction, the Conceſſion of our own Faculty and the Writings of thoſe who profeſs the Municipal Laws in this Kingdom: but this is only to rectifie the Advocates Obſervation. We grant the Chapter Law in *England*, but as long as this Chapter is interpreted by a ſubſequent Law, and the common Gloſs agreeable to that Interpretation, the Gloſs is of equal authority with the Text, as proceeding from one and the ſame Fountain. I wonder that the learned Advocate ſhould not hitherto diſcover (or elſe ſhould have ſo mean an opinion of us in *England* as to think we ſhould believe) that *ſponſalia inter puberem & impuberem per verba de præſenti*, ſhould be equivalent to an abſolute Marriage, he ſhould have done well to have prov'd that the common opinion, and then have inferr'd. We have ſufficiently prov'd the contrary, and therefore deny that affinity is contracted *per ſponſalia*. His other Argument ariſes from the ſame miſtake, for he will have this Contract a very Marriage, and not *ſponſalia*, whence he concludes, 'tis *matrimonium ratum*, which is begging the queſtion. For a Contract *inter puberem & impuberem*, being but *ſponſalia de futuro* (as we have prov'd) there is yet no *ſocietas conjugalis* contracted and by his own conſequence they are hitherto *diverſa Caro*. I grant his Rule of *Concubitus non conſenſus*, and that Marriage is a Contract which receives its perfection from conſent alone, but on the other

* *Et ita apud Exteros Juriſdictioni Papæ non ſubdito. sv. Ciprian. Regner. in fin. Conſ. Jur. Can. Vid. Coſens Anſwer to the Abſtr. in proem. Cok. Cawdries c. Duck de uſu &c. in poſteriori parte & Zouch. in deſcrip. Jur. Eccl.*

Vid. Hieron. Torniel. ubi ſupra.

L. 1. ff. de ſponſal. & l. 6. Cod. eod.

ſide the Advocate muſt grant, that Eſpouſals are in like manner ſo perfected, and as Eſpouſal and Marriage are diſtinct Acts, a diſtinct conſent is alſo neceſſary. If ever the Advocate can make it out, that *vinculum matrimonii* is contracted *inter puberem & impuberem*, altho *per verba de præſenti*, unleſs the defect of age be otherwiſe ſupplied, I will grant him that this ſecond *vinculum* with Mr. *Villiers* is untied, but not before. His very quotation from *Philiarchus* proves the contrary, the words refer merely *ad ſponſalia*, and conclude thus, *Pubes autem qui cum impubere contraxit contractui ſtare debet, ſi alter velit*, but the *impubes* cannot claim this ratification *niſi poſt pubertatem adeptam*, until that time therefore it is but a Promiſe *ad matrimonium contrahendum*, and not a Contract; but without a Contract there can be no *vinculum matrimonii*: What then if the *Pubes* diſſent or recede from this Promiſe before the ratification, or that the ſame can paſs into a Contract? Why *Zanches* and the Caſuiſts preſcribe that which is notorious, and certain (without other reaſons to excuſe it;) She is ſubject to Penance, *in foro interno, ob fidem mentitam*, but nevertheleſs freed *à compulſione fori externi*, and herein the Law is full and poſitive. The next Paragraph *fol.* 17. hath as plain a meaning as the former, *Panormitans* Doctrine is moſt true, but there is hitherto in our Caſe *ſponſalia tantum*, *non matrimonium*, between which there is as wide a difference, as between *ſpem* and *rem*, or as a Modern Author hath it, *inter præſentationem ad officium, & confirmationem.*

Cap. 1. de ſponſa. duorum ubi. Abb.

Carpz. Juriſp. conſiſtorial. l. 2. tit. 4. diſp. 66. n. 18. & Ant. Fabr. Juriſp. Pap. ſub tit. de nupt.

The

The following Obſervation is more remarkable.

The Canons are more favourable to marriage than to profeſſion, *&c.* inſomuch that at ſeven years of age marriage may be valid *quoad obligationem.*

This is a Doctrin certainly compos'd for the ſake of the next little reflexion upon the Lady, *quia natura, &c.* What the Pope might do to prevent effuſion of Chriſtian bloud, or to reconcile, it may be, two angry Princes, we ſee in ſome extraordinary caſes, but is ſtill *pro bono publico, pro bono pacis,* there is as inevitable neceſſity for a Marriage in ſuch caſes (if I may be facetious with the Advocate) as at the laſt Scene of a Play; but this is *de raro contingentibus,* as the Epiſtolizer notes, and conſequences are not to be deduc'd from matters ſo extraordinary. Hence it is that the Remedy of diſpenſation is here neceſſary, * and the Advocate is not ignorant what fine devices the Court of *Rome* hath to work miracles *pro bono pacis:* The words *Etiam perinde valere, &c. de antefacto, & poſtfacto,* will do ſtrange things, but the word *diſpenſation* implies the Law ſtill directly to the contrary. Regularly Marriage cannot be contracted at ſeven years of age, or be valid *quoad obligationem matrimonii.* The determinate age prefix'd to contracts of Marriage is 14 in the Male, and 12 in the Female: It is true in thoſe Countries where the Council of *Trent* obteins not, (as here) that conſent may otherwiſe be ſupplied, that is, from ſome acts ſubſequent (alledged and prov'd) the Law will preſume that this promiſe *de matrimonio contrahendo* hath paſſ'd *in matrimonium contractum,* but in caſes of profeſſion and teſtaments it cannot be ſo ſupplyed; for there the Law

* *Vid. Proſp. Fagnan. in c. 1. de deſp. Impub.*

Law induces no ſuch preſumption, how then this obſervation can relate to the Queſtion in controverſie, I can no more apprehend than I do the Reaſon of the Quotations out of *Aurea Armilla Cod. Legum Viſigothor.* or that the Advocate hath made any colour of proof, that the gloſs *Super C. de Illis* is againſt any text of Law or the common opinion of the Doctors. But with the ſame attempt and the like ſucceſs hath he adventur'd to overthrow the Judgment of the Roman *Rota*. The words are theſe:

De Deſponſ. Imp. Epitome.

Pubes contrahens cum impubere etiam per verba de præſenti, ante tempora pubertatis poteſt cum alio pubere matrimonium legitimum contrahere, non obſtante promiſſione Juramento firmata & Superioris prohibitione. Deciſ. 1. alias 450.

Si pubes contrahit matrimonium in facie Eccleſiæ cum muliere impubere per verba de præſenti & anteaquam mulier perveniat ad pubertatem ſive legitimam ætatem, dictus pubes etiam contra inhibitionem ſibi factam per Epiſcopum, cum alia muliere pubere contrahat carnali copula ſubſecuta : Fuit dubitatum utrum teneret ſecundum matrimonium? Et videbatur aliquibus quod non, per c. de illis 1. verſ. mulier autem de deſp. Imp. qui quidem verſ. alleg. pro caſ. nam prædictus pubes ex quo ſemel conſenſit in eam non poterit poſtea diſſentire, niſi illa poſt pubertatem diſſenſerit, ut ibi. Et Rationem poſt Gloſs. per Regulas communes C. quod ſemel placuit &c. & C. quod ſemel approbo, &c. & ibi vid. Jura. Fuit determinatum contrarium per omnes per Gl. fin. ib. in fin. quæ dicit expreſſe quod licet prædictus pubes teneatur expectare mulierem impuberem donec perveniat ad ætatem legitimam, hoc non eſt ratione matrimonii, quod nullum

nullum fuit propter defectum ætatis mulieris impuberis, ut in C. literas & C. accessit eod. tit. sed ratione promissionis suæ contra quam veniendo, si contrahat cum alia matrimonium, tenet, etiamsi juramentum interveniſſet. All. C. Si inter de desponſ. hoc idem tenet ibidem Innoc. & Hostienſ. Et potest esse ratio, quia fortius vinculum superveniens rumpit debilius, ut d. c. si inter. At in c. proposito. Quod licet inter dictum Puberem & Impuberem fuerit matrimonium contractum per verba de præsenti, tamen juris fictione fuerit revera sponsalia de futuro. C. unic. de desp. Imp. in sexto; quæ rumpuntur per sponsalia de præsenti postea legitimè inter puberes contracta, ut in d. c. Si inter. Multa enim fieri prohibentur quæ si facta forent tenent, ut in c. Ad Apostolicam de Regularibus. Quæ Regula infallibilitèr tenet in actibus irretractibilibus, sive irreiterabilibus, ut in sacramentis & non in non habentibus causam perpetuam prohibitionis, ut in c. nostro de quo in c. tua de sponſ. duorum. Et per hoc etiam respondebat etiam ad prohibitionem sive interdictum Episcopi, quod non dissolvit matrimonium postea contractum, nam fortius est matrimonium quam interdictum etiam Papæ, prout leg. in d. c. ad dissolvendum de desp. Imp. in Gl. final. de matr. contr. cont. interd. Ecclesiæ C. ex litteris, &c. de muliere.

ADDITIO.

a. *Et Hostienſis. Hoc idem etiam tenet ibi D. Abb. in ult. nota. in quantum dicit, nota quod sponsalia de futuro etiam jurata non impediunt matrimonium cum alia contractum.*

b. *Ut in C. Ad Apostolicam. Add. l. 1. ff. de Exc. tut. in Gl. sup. verbo dabitur.*

The Advocate excepts againſt this deciſion as grounded upon a foundation nothing ſuitable to the

c. literas & c. accessit de desp. Impub.

caſe,

caſe, becauſe the texts relate merely to the marriage of Infants, where by the way it is to be obſerv'd that he takes the authority there cited, as ty'd down to the ſtrict letter of the Law recited in thoſe chapters, without reſpect to either the reaſon or equity, which, as I conceive is much otherwiſe, *Scire leges non eſt verba earum tenere, ſed vim & poteſtatem.* The Judges and Aſſeſſors of the *Rota* interpos'd their opinion from the words of the receiv'd *Gl. ſup. C. de illis*, but refer the Reader to the *Cap. Literas & 6. Acceſſit* for the reaſon and ground of that Gloſs, as to a Caſe parallel, that is to ſay, that Aſſembly conſidered a promiſe of marriage *per verba de præſenti inter Puberem & Impuberem*, in the ſame circumſtances with a promiſe *de futuro inter Impuberem & Infantem*, the one being equally as invalid *quoad matrimonium*, as the other *quoad ſponſalia.* And from the reaſon of the Law they conclude, That a *Pubes* contracting *cum Impubere* (altho *per verba de præſenti*) had no obligation *ratione vinculi matrimonii* to perfect this promiſe, ſo that *ſi contrahat cum alia, matrimonium tenet, etiamſi Juramentum interveniſſet.* All which hath been before inculcated, and ſo often, that it would be tedious to enlarge further.

The authority of *Navarrus* is notable, but let us take in all the little ſentence of *Gratian, Ubi non eſt conſenſus utriuſque ibi non eſt conjugium.* If the Advocate take *Matrimonium contrahere* in the proper ſenſe, then is his interpretation of the Law *in ſponſalibus. ff. de ſponſalibus* moſt improper, *ſponſalia & matrimonium* being terms never promiſcuouſly uſed in that Law (I mean of the Digeſts) and this will beſt appear by compari-

Vid. Anton. Auguſt. in 2. Collect. & Cujac. in d. c. ubi non eſt conſenſus.

ſon

ſon of the definition of Matrimony with that of *Sponſalia*; though when I find the common opinion of the Doctors, the receiv'd Gloſs and expreſs Text of the Law to the contrary, I had rather believe this to be a Lapſe in *Navarrus* and the Learned Advocate, than incline to their conjecture.

The next is the conſideration of an objection (as the Advocate is pleaſed to call it) concerning the diſſolution of marriage *per fornicationem*, where (by the way) he makes no diſtinction *inter ſponſalia & matrimonium*, but how or when it is poſſible to relate unto this caſe I cannot diſcern, and therefore leave it to its utmoſt operation.

The other *C. Si inter. §. Si vero.* deſerves a little more remark, and but a little; for if that Chapter refers *ad ſponſalia tantum* (as it does, by the Advocates confeſſion) and we have ſhewn that a contract *inter Puberem & Impuberem*, altho *per verba de præſenti* is but a promiſe *de futuro*; this I conceive muſt inevitably make againſt the deſign of our Adverſary. And *ſi inter vincula inæqualia, fortius, etſi poſterius, vincit*, the victory is hitherto on our ſide.

It is a moſt certain truth for ought my reading hath inform'd to the contrary, that *ſponſalia de præſenti* are improperly ſo called *reſpectu vinculi*, that is, the words *de præſenti* do not alter the nature of the Promiſe, or make that as done to day, which it is impoſſible to be done before to morrow. The Invention is wholly the Canoniſts, the Civil Law know but one ſort of *Sponſalia*, and that is a mutual Promiſe *de futuris nuptiis contrahendis*. Hence the Reformed Churches beyond

Carpz. ubi supra. the Seas, allow not of a Promiſe *de præſenti* for an abſolute Marriage, the reaſon is becauſe a preſent obligation legally cannot ariſe from a Promiſe, which of its own nature has reſpect *ad futurum* until ſuch time as that promiſe is paſſed into a perfect Contract.

But to give an impartial account of this Chapter, and the ſenſe thereof, it amounts only unto this, *viz.* That a Contract *de præſenti* is not diſſolved by a ſubſequent Marriage, altho conſummated by carnal knowledge, when a Promiſe *de futuro*, altho confirm'd with an Oath, is diſſolved by a ſubſequent Contract of Marriage or Promiſe *de præſenti*. It had not been much amiſs to have tranſcribed the words of the Text, but the Advocates own Relation is enough, and of it ſelf makes the miſtake too manifeſt to be further expoſed. To infer therfore from hence, that the *Vinculum* and Execution of the Promiſe between the Lord *Decies* and Lady *Fiz-Gerald* may depend upon the acceptance or conſent of the Lord *Decies* when he comes to age, the Lady being indiſſolubly bound already, is an opinion as void of reaſon as it is of authority, unleſs any man will affirm that a Contract *ultro citroque obligatorius* can be induc'd from the conſent of one party only, which in it ſelf implies a contradiction.

The note from *Clerks* practice may receive an anſwer from the deciſion of the *Rota* before mentioned, though, as I am confidently aſſured, there was never any judicial Inhibition ſerved upon the Lady. It hath alſo been above demonſtrated, that *ſponſalia* or Promiſes *de futuro* are not only diſſoluble *per ſententiam Judicis*, but *ipſo jure*; and as to the poſition following, that

that a Promise *de futuro* is *matrimonium ratum*, or that *frangentes sponsalia jubentur cogi censura Ecclesiastica, re non integra*; They are doctrines both against the express Text and Current of all Writers. But as to the conclusion of the Paragraph: If the Rule (*matrimonium fortius est vinculum &c.*) be to be understood comparatively as only between *matrimonium consummatum* and *sponsalia de futuro*, the advantage is nevertheless on our side; for the promise between the Lord *Decies* and the Lady *Fitz-Gerald* was but *de futuro*. But there was and is an actual Marriage consummated between the Lady and Mr. *Villiers*.

The objection from the Stat. if it be 32 *H.* 8. *c.* 38. requires neither answer or explanation; but the next passage concerning the Reciprocation of Contracts, seems very abstruse and intricate. It hath been shewn above, that a contract of Marriage, *quatenuus* a contract, must oblige on both sides or neither, for the effect must be answerable to the cause, which is the reciprocal consent of both parties; the Rule of Law is hereunto very suitable, *Consensus non alias ad contractum valet quam cum utrinque eodem tempore concurrit*. Contracts are to be considered as from the time of the obligation, not the execution, now in contracts of marriage both the perfection and obligation depend upon the mutual and simultaneous consent of parties; so long therefore as that consent is on one part defective this can be no reciprocal contract, for reciprocation infers the act of two, and the one part as correlative cannot subsist without the other. Hence they are ever noted as bilateral & *altro citroque obligatorii*. But an obligation reciprocal

L. 1. ff. de Pactis. Bald. Cons. 194. *l. 3. Surd. decis.* 132. *Pacian. de Probat. l. 1. c.* 30. *Vid. Surd. decis.* 364. *p. tot.*

cannot arise from an imperfect contract or the consent of one part only. To apply it home to this case. The words of the Lady may induce a personal obligation *ad matrimonium contrahendum*, but before there is a reciprocal consent *de novo, quoad ipsum matrimonium*, this is no marriage. And therefore to assert that a contract of marriage may be reciprocal and the consent of one part nevertheless in expectance, forasmuch as I can yet be convinc'd to the contrary, is a mistake and a great one. *Quod pendet non est pro eo quasi sit.* If a Bargain and Sale be agreed upon *sub conditione* (either expres's or tacitely inherent) this is no Bargain and Sale, till the event of that condition, nor will any dominion or property pass hereby. In the *C. super eo de Cond. appos.* there is an example nearer to our purpose. Two persons contract marriage under condition of the Fathers consent. Tho the Father *ex post facto* interpose his consent, this without a new consent of the parties (altho the words were *de præsenti*) is not *ipsum matrimonium*; And if he that promised under such condition shall (*re integra*) contradict this Promise by a pure and absolute Contract of Marriage elsewhere, the Contract of Marriage is good, and the conditional Promise extinct: whereas if the Promise of Marriage were already a reciprocal Contract, then the Obligation must from the time of that Promise be reciprocal also, and consequently indissoluble, so that a subsequent Marriage in prejudice of such Promise (notwithstanding the Reclamation thereof) would be nevertheless invalid, which I think no man will affirm.

Vid. Antonin. Dian. *in trac.* 4. *de Sacr. Resol.* 244. *citat & concludit rotunde cum Basilio Pontio l.* 12. *c.* 4. *contra Zanc.*

Vid. Dian. & Pont. ubi supra.

The Learned Advocate takes (or rather mistakes) the

the Case of Bargain and Sale *cum clausula retrovenditionis*; for a conditional Contract, which under favour it is not, for the Contract of Vendition is a pure and entire Contract, the dominion or property of the Horse is absolutely transferr'd; but to the Contract the parties have annex'd a Covenant of Redemption, by which the Buyer is obl ig'd to sell back the horse, and to enter into a new contract, from the date whereof he acquires that obligation, which in other Countries is call'd *Retraict conventional*, and is so far from being reciprocal, that on the contrary it is not to be extended, and the buyer (unless it be expresly so agreed in the Covenant) cannot compel the Seller to redeem the horse against his will.

Vid. Vinn. Inst. de Empt. et Vend. §. 4. Fab. in. Rat. contrah. Empt. in principio.

Having thus examin'd the Rule and Example, I proceed to the Inference which corresponds as little with either, as they do between themselves, and proves just as little as a man can desire; for if it were a good and reciprocal Contract of Marriage, notwithstanding the inequality of conditions, then the same were indissoluble and Reclamation unnecessary. But it appears, that the same is not indissoluble, for (says the Advocate) the Law implies Reclamation, and Reclamation implies it is not indissoluble. A Contract of Marriage therefore with condition of Reclamation, during the existence of such condition, is no good and reciprocal Contract of Marriage: The proof I take to be evident of it self, and I hope it is as evident which side is mistaken.

The next is a digression of the Learned Advocates concerning the marriage of Infants, which being not our Case I pass it over. And

And for that saying of the celebrated Doctor *Petr. de Anchorano* on the 6. *C. Si Infantes de desponſ.* If I ſhould give it no anſwer, I am juſtly excuſable until ſuch time as there is ſuch a Chapter either in *Anchoranus*, or in the Body of the Decretals, the *cap. unic. in ſexto*, begins *Si Infantes*, but then I find no ſuch Gloſs, though let it be any where, I preſume it hath been manifeſted both by Reaſon and Authority, that the Obligation extends only *ad fidem promiſſionis* and not *conſenſus*: And therefore *Panormitan* a celebrated Doctor, and whoſe Gloſs carries a reputation inferiour to no man's that hath yet wrote upon the Canon Law, concludes that a Contract *inter puberem & impuberem*, though *per verba de præſenti*, reſolves it ſelf *in ſponſalia de futuro*; and that *contrahens de futuro, & deinde cum alia de præſenti, debet adhærere ſecundæ; nam Fides conjugalis contractus eſt duplex; eſt enim fides pactionis & fides conſenſus: unde nota quod omnis pactio quantumcunque ſimplex poteſt appellari Fides, unde veniens contra promiſſionem dicitur venire contra fidem per eum præſtitam. Et poteſt promiſſio appellari Fides ad inſtar Religionis fidei, quia ſicut ibi credimus quod non videmus, ita in promiſſione credo in futurum quod promiſiſti, licet non videam; unde dicitur fides quia fiet. C. 1. de ſponſa duorum.* If this Promiſe then be but *de futuro*, the Queſtion is whether or no the ſame is not diſſoluble by ſubſequent marriage elſewhere, in the ſame manner with other Contracts *de futuro*, and that the Advocate never inquires after. With theſe few diſtinctions I might admit his Spring-tide of Authorities (as he is pleas'd to call it) and do the Cauſe in controverſie no prejudice, *viz.* Let it be conſider'd,

C. de Illis 1. de Deſp. Imp. & Cap. ex Literis eo.

consider'd, that there is a difference *inter sponsalia & matrimonium, inter fidem pactionis & consensus*; And lastly, *inter forum Pœnitentiale & Judiciale* and I may grant all he can say to this Controversie. But because his Authority out of *Panormitan* being taken all together doth very much resemble our fact, I thought fit to transcribe it, (not to accuse the Advocates ingenuity in quotation) but merely for the better satisfaction of the Reader. And first he summs the Chapter up thus, *Si major invita contraxit sponsalia cum minore, non tenetur ipsum expectare donec veniat ad ætatem adultam.* Then he puts the literal Case thus, *Quædam puella duodecim annorum, desponsata fuerat cuidam puero novem annorum, & postmodum de voluntate parentum & & non sua (ut dicebat) ad domum Patris illius pueri ducta fuit invita & nolens, & minis Parentum compulsa fecit ibi moram per annum: Et tandem ad domum proprium est reversa dicens quod nunquam in eum consensit nec vult consentire, imo petebat licentiam cum alio contrahendi. Quærebatur, Quid Juris? Respondet Papa, Cum dictus puer nondum ad quartodecimum annum pervenerit nec ad eam carnaliter accessum habuerit, mandat quod si puella commonita ipsum noluerit expectare quousque ad legitimam ætatem pervenerit, & si est ita ut propositum est, tribuat liberam licentiam cum alio contrahendi.* His notes hereupon are these, 1. *Licet isti intenderent contrahere matrimonium, tamen propter defectum ætatis alterutrius fuerunt sponsalia de futuro, & ipso jure non valuerunt propter metum intercedentem.* 2. *Minæ Parentum inducunt justum metum maxime in muliere, quod ego admitterem considerata qualitate parentum & minarum.* *Ultimo, nota quod major contrahens cum minore, tenetur*

c. ex Literis 14. de desp. Imp.

& c. unic. in 6.

netur expectare minorem donec perveniat ad ætatem legitimam, ut in C. de Illis. hoc est verum, nisi major invitus contraxerit cum minore, tunc enim non tenetur expectare minorem. Where I desire it may be observ'd, that the baie assertion of Fear and the Reluctancy of the Major after admonition, altho she had cohabited with the Minor near a year, were motives sufficient to grant Licence for her marriage elsewhere. I take it we have greater aggravations and more particular circumstances of Fear, and a better proof than seems in this Case; but I am sure there is more declar'd by the Lady, besides the withdrawing of her self under just apprehensions of Fear and publique Protestations of her dislike, *&c.* but I insist not upon that point. It appears that there may be reasons to excuse her, even *à fide promissionis*, and that she is not indefinitely bound to expect.

In D.C. de Illis ubi supra citat 29. q. 1. §. 1. & 27. q. 2. §. 1.

Secondly, Even here appears a contract *de futuro*, and then what is the Opinion of *Hostiensis*? Why (these are his very Words) *Certum est quod aliqui contractus posset tenere ex parte una & non ex altera, in matrimonio tamen secus est, quia aut statim tenet quoad utrumque aut nunquam tenet. Et scias pro regula, quod etsi pubes & impubes matrimonium contrahant per verba de præsenti, vim sponsalium habent tantum non matrimonii. Et quæcunque verba interveuerint si pubes factus vel impuberi ligatus (antequam aliter possit judicari matrimonium præsumptum) cum aliâ legitimæ ætatis contrahat, per verba de præsenti, solvitur vinculum primum tanquam debilius per secundum superveniens fortius.* Hostiens. *ubi supra in fin.* C. *Si inter de sponsal.* C. 1. *de sponsa. duorum*, this being the Opinion

nion of the Advocates moſt eminent Authors, I ſhall not trouble my ſelf with examination of either Caſuiſt or Summiſt, we are here *in foro Judiciali*, and then theſe Doctors inform us what is to be done, and the Reaſon of it: But that ever it can hence follow, that this Lady having contracted marriage, tho contrary to her Promiſe *de futuro cum impubere*, may be judicially reſtored to the young Lord *Decies*: I challenge both the learned Advocate or any other Caſuiſt, Summiſt, or Commentator to produce either Reaſon or Authority. And then to the firſt point of his Recapitulation, I reply, 1. That the Contract, or rather Promiſe, paſs'd between the Lady *Fitz-Gerald* and the Lord *Decies* being extinct and diſſolv'd by this ſecond Marriage with *Edward Villiers* Eſquire, the Lord *Decies* is at liberty to promiſe again if he pleaſe.

2. That altho the Lady were above the age of Twelve at the time of the Contract with the ſaid Lord *Decies*, yet being ſeduced thereunto by threats, violent perſwaſions, and undue practices, contrary to her own will and ſpontaneous inclination, as ſhe hath declar'd and proteſted before the Lord Arch-Biſhop of *Canterbury*, and ſo ſoon as ſhe could obtein an opportunity to manifeſt the ſame by proteſtation, was neither by Law or Conſcience oblig'd to perfect ſuch contract, as hath abundantly been prov'd. But without theſe circumſtances the Promiſe unto the Lord *Decies* being extinct, the Marriage with Mr. *Villiers* is good, and the Rule, *Multa prohibentur fieri quæ facta tenent*, holds even in the Caſe. *Barboſ. in coll. ſupra c. Ad diſſolvendum.*

3. If

3. If by the Ladies marriage with Mr. *Villiers*, there is *vinculum indiſſolubile*, contracted between them, I leave it to be prov'd by what Law or Conſcience ſhe can be compell'd to cohabit with the Lord *Decies*.

4. If the *vinculum* between Mr. *Villiers* and the Lady be *indiſſoluble*, it is not in the power of any Judg Civil or Eccleſiaſtical to moleſt or impeach the ſame by Sequeſtration.

5. Altho this Marriage had been celebrated contrary to the Inhibition of the Church, yet this Inhibition iſſuing forth *ſine clauſula irritante*, doth not invalidate the Marriage, and whatever exceptions and prejudices the clandeſtinity of Marriage might occaſion, they were and are reſerv'd to the Advocates diſcretion to make what Uſe he can of them upon the Argument and final Determination of this Cauſe.

6. What the conſequence will be to allow a Lady the Cohabitation with her lawful Huſband, Or what Injury to the Lord *Decies*, Or what pernicious example and effect to the Publique, I ſubmit unto all indifferent and unprejudicate apprehenſions.

To conclude therefore, The Promiſe or Contract between the Lady *Fitz-Gerald* and the Lord *Decies*, being but a Contract *de futuro*, and diſſolv'd

ſolv'd by abſolute Contract of Marriage *de præſenti* conſummated with *Edward Villiers* Eſquire; "The Rule of *factum valet* holds good in this "Caſe, and priority of Promiſe muſt inevitably "give place to poſteriority of Contract, notwith- "ſtanding the Statute 1 *Eliz.* ſtands unrepeald.

April 21.
1677.

Robert Thompſon.

FINIS.